

Bajwa (Migration) [2020] AATA 1900 (15 May 2020)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Gurpartap Singh Bajwa
CASE NUMBER:	1834479
DIBP REFERENCE(S):	BCC2014/1635176
MEMBER:	Tim Connellan
DATE:	15 May 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 572 Vocational Education and Training Sector visa: • Public Interest Criterion 4020 for the purposes of cl.572.224 of Schedule 2 to the Regulations.

Statement made on 15 May 2020 at 6:25pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) – Subclass 572 (Vocational Education and Training Sector) – Federal Circuit Court remittal – bogus document or false or misleading information – financial support – departmental investigator concluded financial supporter was not applicant’s grandfather – evidence of relationship – applicant’s mother’s school results includes grandfather’s name – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 65, 97

Migration Regulations 1994 (Cth), Schedule 2, cl 572.224, Schedule 4, criterion 4020(1)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 25 February 2015 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 3 July 2014. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.572.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found the applicant had provided evidence that was non-genuine in support of his application in that he provided financial evidence he claimed to be that of his grandfather. The Department investigations indicated he owner of the funds was not his grandfather.

6. Background

7. In his original application lodged on 3 July 2014, the applicant provided an affidavit from Jagjit Singh who stated his intention to provide financial support to the applicant. It was accompanied by evidence of deposits with the PNB and tax and income statements for Jagjit Singh. It claimed that Mr Singh was the applicant's grandfather.
8. The department conducted investigations including interviews and document checks which led them to believe that Jagjit Singh was not the applicant's grandfather. The department wrote to the applicant and invited him to comment on this adverse information within 28 days. The applicant did not respond.
9. The department subsequently made the decision to refuse the application stating that based on the evidence and information before the delegate, she found the applicant had given a bogus document within the meaning of s 97 of the Act or information that is false or misleading in a material particular. Accordingly, she was not satisfied that the applicant met Public Interest Criterion (PIC) 4020, subclause 4020(1) and accordingly 572.224 was not met.
10. The matter was appealed to this Tribunal and constituted to a member who made a decision on the matter which included the following:

By letter dated 15 March 2016, the Tribunal wrote to the applicant pursuant to s.359(2) to provide information relevant to PIC 4020.

In the invitation the applicant was advised that, if the information was not provided in writing with a period ending on a specified date, the Tribunal may make a decision on the review without taking further steps to obtain the information and the applicant would lose any entitlement under the Act to appear before the Tribunal to give evidence and present arguments.

The applicant has not provided the information within the prescribed period and has not responded to the invitation in any way.

*In the circumstances, s.359C applies and pursuant to s.360(3) the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40.*

The Tribunal has decided to proceed to decision without taking further steps to obtain the information.

11. information.

12. The member affirmed the decision of the department noting;

13. *The applicant provided a copy of the delegate's decision to the tribunal in which the delegate*

14. *notes:*

15. *a. That the applicant provided to the Department an affidavit of support and financial*

16. *information for a "Jagjit Singh" who was described as the applicant's grandfather;*

17. *b. Departmental investigations out of New Delhi revealed that "Jagjit Singh" was not the applicant's grandfather.*

18.

19. *A grandfather is an 'acceptable individual' in Schedule 5A. Evidence of funds held by such*

20. *an individual are capable of being given to satisfy cl.572.223(2)(a), and therefore relevant to*

21. *whether that criterion is satisfied.*

22.

23. *The tribunal finds that the information given by the applicant to the Minister's delegate, an*

24. *officer of the Department, included information that "Jagjit Singh" was his grandfather.*

25.

26. *The tribunal finds on the evidence that "Jagjit Singh" is not in fact his grandfather and is not*

27. *any other kind of acceptable individual noted in Schedule 5A.*

28.

29. That decision by the Tribunal was appealed to the Federal Circuit Court which remitted the matter to the Tribunal for the following reasons:

30. *There was no evidentiary foundation for the claim that the person named in the financial documents is not the grandfather of the applicant.*

31. *It was an allegation that began in the letter of the delegate and because it was not answered, it was assumed by the delegate to show a bogus document and because it was not answered to the Tribunal it then became elevated to a basis for a finding of fact that the person named in the financial documents is not in fact the grandfather of the applicant.*

32. *It was not legally reasonable to draw an inference sufficient to found a finding of fact, as drawn by the Tribunal, merely from the failure of the applicant to respond to the letters.*

33. who on 15 March 2016 sent the applicant an invitation under s.359(2) to provide information and to give reasons why he believed he had not breached PIC 4020.

34. The matter has been constituted to a different member of the Tribunal and is the subject of these proceedings.

35. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

36. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.572.224 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
37. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.
- Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**
38. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
39. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
40. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However,

an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

41. Following the initial application in July 2014, the department made enquiries which indicated a sponsor referred to as the applicant's grandfather may not in fact have been his grandfather. The Department invited the applicant to comment on this adverse information however he failed to respond. Consequently, the department refused the application on the basis that one of the applicant's sponsor was not the applicant's grandfather as claimed and therefore found the applicant had provided evidence that created a breach of Public Interest Criteria 4020.
42. On appeal, the Tribunal wrote to the applicant inviting him to comment on his potential breach of PIC 4020. The applicant did not respond.
43. In the absence of a response, the member decided to proceed to a decision without taking further steps to obtain the information.
44. The member found that "Jagjit Singh" was not in fact the applicant's grandfather. It is unclear what evidence the member relied on in making this finding other than the decision of the delegate in the original decision.
45. The applicant provided evidence of the relationship in the form of his mother's Punjab Education Board school results from 1990 which listed Sr Jagjit Singh as her father i.e. his maternal grandfather.
46. The Tribunal is satisfied that this information establishes the relationship between the applicant and Jagjit Singh as grandfather and grandson.
47. Having considered this evidence the Tribunal is satisfied that the applicant meets PIC 4020(1).
48. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.572.224.

DECISION

49. The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 572 Vocational Education and Training Sector visa:
 - Public Interest Criterion 4020 for the purposes of cl.572.224 of Schedule 2 to the Regulations.

Tim Connellan
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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